10-6-1975

Clay Pearson and Edna T. Pearson, his wife v. Jean Hamilton

Reply Brief 1975-SC-0638

REPLY BRIEF

COURT OF APPEALS OF KENTUCKY

File No. 75-638

CLAY PEARSON and
EDNA T. PEARSON, his wife ..... APPELLANTS

VS:

JEAN HAMILTON ..... APPELLEE

APPEAL FROM THE MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE

REPLY BRIEF FOR APPELLANTS

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This is to certify that a true copy of this brief has been served upon Hon. John D. Sword, attorney for appellee, Sword & Floyd, Taylor Building, Richmond, Kentucky 40475, and to Hon. James S. Chenault, Judge of the Madison Circuit Court, Richmond, Kentucky 40475, this 3 day of October, 1975.

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Findings, Conclusions and Judgment of the trial court are wholly unsubstantiated by the record; are, therefore, "clearly erroneous"; and must, therefore, be reversed?

2. Whether the trial court erred in granting appellee a summary judgment, based upon the state of the record at the time of judgment?

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The appellants adopt their original Statement of the Case, and refute the Counterstatement and Arguments of the appellee as appears within.

ARGUMENT

I. THE FINDINGS, CONCLUSIONS AND JUDGMENT, OF THE TRIAL COURT ARE WHOLLY UNSUBSTANTIATED BY THE RECORD; ARE, THEREFORE, "CLEARLY ERRONEOUS"; AND MUST, THEREFORE, BE REVERSED.

The appellee contends, in brief, that the trial court's findings are "based upon substantial evidence provided by expert testimony throughout the record", (Appellee's Brief, Argument I, p. 3). Having made this contention, the appellee proceeds to disprove it.

At no point in her brief does the appellee even suggest that any proof was elicited by the parties tending to show that the leaning of the parties' respective houses had existed for longer than two years. The appellee, in fact, emphasizes to this Court that her expert witness, Ballard Luxon, III, had taken measurements of the respective residences only twice, and that the first was taken only two years prior to trial. No other proof is cited to this Court as evidence to support the trial court's finding of a mutual tilting for "many years"; no other proof can, in fact, be cited to support the findings; and, consequently, the finding is based upon somewhat less than the substantial evidence which the appellee assures this Court exists in the record. Since a period of two years in no way begins to approximate the claimed "many years", necessary to work an estoppel, the finding is clearly erroneous.

Additionally, the finding of "mutual acquiescence", contended by the appellee to have been "based upon substantial evidence provided by expert testimony", dissipates into the realm of fantasy, when checked against the cold, hard reality of the record. At no point does the appellee cite the Court to a single page of the record to substantiate her assertation that a "mutual acquiescence" has been proved, *save for her undying reliance on the observation of the trial court* (which, the appellants repeat, was had without notice to, or accompaniment by, the parties or their counsel and which, the appellants repeat, is not evidence which can support a summary judgment).

The appellee further, and amazingly, contends that the appellants are somehow barred from objecting to the fact the trial court's findings are erroneous, because they have only contended before the trial court that the findings were "wholly unsupported by the evidence", (TR p. 84; Appellee's Brief, Argument II, p. 9). This contention is tautological, and clearly untenable. Any finding which is wholly unsupported by the evidence is clearly erroneous, as a matter of logic and of law. *Massachusetts Bonding & Ins. Co.* v. *Huffman*, Ky., 340 S.W.2d 447, CR 52.01; Clay, Kentucky Practice 3rd Ed., Civil Rule 52.01.

Since the inception of the presently operative Kentucky Rules of Civil Procedure, formal exceptions

to rulings or orders of the court are unnecessary, CR 46. This being so, the appellants have sufficiently preserved the error committed by the trial court by submitting a Memorandum of Law, (TR pp. 18-21), prior to final judgment, setting out the action which the appellants desired the court to take, and by appealing the final judgment to this Court.

Additionally, the appellants herein have filed a Motion to Amend the Findings of Fact and Conclusions of Law, which was overruled by the trial court. Even were that not so, the issue of the sufficiency of the evidence to support the findings, and the concommitant issue of whether the findings were clearly erroneous, would be properly before this Court by virtue of CR 52.03, which provides as follows:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised *whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them* or a motion for a judgment or a motion for a new trial. (Emphasis supplied.)

It follows that the appellants are clearly within their rights in questioning the correctness of the trial court's findings and judgment, and that the

soundness of said findings and judgment are squarely before this Court in the instant appeal.

II. THE TRIAL COURT ERRED IN GRANTING APPELLEE A SUMMARY JUDGMENT, BASED UPON THE STATE OF THE RECORD AT THE TIME OF JUDGMENT.

The findings of fact and conclusions of law in this cause are clearly erroneous, as has been displayed in the appellants' original brief, and in Argument I herein. However, even if said findings and conclusions were non-existent, the judgment rendered herein would be reversible.

The rendition of a summary judgment is not dependent upon the prior existence of findings of fact and conclusions of law, as borne out by the following:

> Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . .

CR 52.01. Of course, CR 56 is the summary judgment rule. Consequently, the validity of a summary judgment is dependent upon the entire record.

The record does not support the judgment, as has been hereinbefore argued. The appellee's only alleged support for judgment is the trial court's surreptitious observation of the premises.

Despite the appellee's protestations to the contrary, *Owens* v. *Talbot*, 262 Ky. 550, 90 S.W.2d 723 is clearly in point with the case at bar. As pointed out in our original brief, this Court has therein clearly stated that such inspections "do not supply evidence omitted" from the record, but merely aid the trial court in *understanding evidence already in the record.* The observations of the trial court in the instant case, if they are to form the basis for the judgment rendered, inappropriately and erroneously *supply evidence omitted* in the record. Hence, they cannot sustain the judgment.

The cases cited by the appellee to support the trial court's observation are clearly inapposite. None of the cases involve unannounced, surreptitious visitations. All involve situations where the court visited the premises to heighten its understanding of the facts, not to obtain facts missing from the record. In *Wilcox* v. *Lee*, 264 Ky. 65, 94 S.W.2d 294, cited by appellee, the evidence was in the record, albeit "conflicting". It was therefore beneficial to the court's understanding of the situation to visit the premises; it was not, as here, necessary for the development and proving of the case of one of the parties.

In *Justice* v. *Blackburn*, 300 Ky., 591, 189 S.W.2d 955 and *Johnson* v. *Johnson*, the two other cases cited by the appellee, the court again only viewed the premises to obtain a clear picture of

evidence *already extant in the record.* Those cases are in direct contradiction to the case at bar, where no evidence existed in the record as to the length of the tilt or the question of acquiescence until the trial court *supplied the evidence via its personal inspection.* Clearly, then, *Owens* controls at bar, and mandates reversal.

In closing, the appellants wish to point out that one of the most serious issues raised in appellant's original brief has gone unrefuted by the appellees, viz. the fact that only the appellants' witness established the location of the property line, and its location pinpointed and unerringly demonstrated that the appellee's house was outside its boundaries and encroaching on appellant's residence, which was well within its own property line. Not even the trial court's observation could negate this crucial fact. In this posture, judgment could not possibly have been correctly rendered against the appellants.

CONCLUSION

The appellee's brief addresses itself primarily to matters outside the record and of no probative value. Appellee simply rests her case on the trial court's observations, which "cannot supply evidence omitted" by the appellee. The judgment is as clearly lacking in support as the appellee's brief. It must, therefore, be reversed.

Respectfully submitted,

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